



INTERIOR BOARD OF INDIAN APPEALS

Cheryl Potts v. Eastern Oklahoma Regional Director, Bureau of Indian Affairs

39 IBIA 268 (04/02/2004)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

CHERYL POTTS,
Appellant

v.

EASTERN OKLAHOMA REGIONAL
DIRECTOR, BUREAU OF INDIAN
AFFAIRS,
Appellee

: Order Affirming in Part, Vacating in
: Part and Remanding Decision
:
:
:
: Docket No. IBIA 03-17-A
:
:
: April 2, 2004

Appellant Cheryl Potts seeks review of a September 5, 2002, decision of the Eastern Oklahoma Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning a Revocable Trust Agreement (Trust) executed by her paternal grandmother, Frances Rogers Potts Roberts, a.k.a. Fannie Potts Roberts (Fannie). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision in part, vacates it in part, and remands the matter to the Regional Director for further consideration.

Fannie was the daughter of Agnes Drum Rogers (Agnes). She was married to Kirby Rogers (Kirby) and was the mother of four children – Lawrence R. Potts, Jr. (Lawrence); Laura Jane Potts (Laura); LeRoy S. Potts (LeRoy); and Arthur Lee Potts (Arthur). Appellant is Arthur's only child.

Agnes died on June 2, 1970. She left a will dated July 8, 1969. In accordance with applicable statutory and regulatory authority, her will was approved by the Superintendent, Osage Agency, BIA (Superintendent), on July 21, 1970, 1/ and was subsequently submitted to the District Court of Osage County, Oklahoma, for probate. 2/ In the Matter of the Estate of

1/ 25 C.F.R. Part 17.

2/ Oklahoma District Courts have jurisdiction in Osage probate matters pursuant to sec. 3 of the Act of Apr. 18, 1912, ch. 83, sec. 3, 37 Stat. 85, as amended by sec. 5(b) of the Act of Oct. 21, 1978, 92 Stat. 1660, 25 U.S.C. § 331 note (1978 Act). Smith v. Muskogee Area Director, 16 IBIA 153, 155 (1988).

Agnes Drum Rogers, Osage Allottee No. 268, Deceased, No. P-70-109 (Dist. Ct. Osage Cty. 1971) (1971 Final Decree). Four paragraphs of Agnes' will are relevant to this decision. Paragraph 2 provides:

I hereby give, devise and bequeath to LeRoy Potts and to Laura Jane Potts, children of Fannie Potts, each one-half ($\frac{1}{2}$) of one Osage Indian headright or mineral interest of the Osage Tribe of Indians.

Paragraph 7 provides:

I hereby give, devise and bequeath unto my daughter, Fannie Potts, the income from my remaining Osage Indian headrights or mineral interests of the Osage Tribe of Indians, during her lifetime, and upon the death of the said Fannie Potts, said Osage Indian headrights shall then vest, share and share alike, in the living children of Fannie Potts, or in the lineal descendants of any deceased child of Fannie Potts, by right of representation.

Paragraph 8 provides:

I hereby give, devise and bequeath unto my daughter, Fannie Potts, a life estate in and to all of my land and real property, and upon the death of the said Fannie Potts, said land and real property shall vest, share and share alike, in the living children of Fannie Potts, or in the lineal descendants of any deceased child of Fannie Potts, by right of representation.

Paragraph 12 of Agnes' will provides:

All the rest, residue and remainder of my estate owned by me at the time of my death, I give, devise and bequeath unto my daughter, Fannie Potts.

In its May 6, 1971, Final Decree, the Osage County District Court found that Agnes owned Osage headright interests; certain real property located in Osage County, Oklahoma, that was identified in an attachment to the order marked Exhibit A; and personal property, including cash on deposit with the Osage Agency, BIA. In accordance with Agnes' will, the 1971 Final Decree distributed a $\frac{1}{2}$ headright interest to LeRoy and a $\frac{1}{2}$ headright interest to Laura and created a life estate in Fannie in a 3.48147 headright interest and in all of Agnes' real property. The real property consisted of approximately 695 acres in sections 11, 14, and 15 of T. 24 N., R. 4 E., and in section 25, T. 22 N., R. 9 E., Osage County, Oklahoma. The

court identified the remaindermen to Fannie's life estate as Lawrence, Arthur, LeRoy, and Laura. ^{3/} The court also passed all of the rest and residue of Agnes' property to Fannie.

Fannie executed a will on February 18, 1988. She left a life estate in certain real property to her husband, Kirby, and headright and other land interests to her children Lawrence, Laura, and LeRoy. The will stated that Arthur was deceased.

On August 23, 1995, Fannie executed a trust agreement and designated Lawrence and Laura as the trust beneficiaries. The assets initially committed to the trust were "at least" a 3.9 headright interest and funds on deposit at the Osage Agency. The Acting Superintendent approved the trust on August 6, 1996. ^{4/}

Fannie passed away on December 31, 1999. On May 31, 2000, the Superintendent notified Fannie's probable heirs of their right to contest her trust. Appellant sent the Superintendent a letter dated July 11, 2000, stating that she had not received Exhibit A of Fannie's trust, which listed the property committed to the trust. Although Appellant stated that her letter was not yet a formal challenge because she was unable to determine the contents of the exhibit, the Superintendent treated Appellant's letter as a challenge to the trust.

While Appellant's challenge was pending before the Superintendent, Lawrence filed for probate of Fannie's estate by the District Court of Osage County, Oklahoma. In the Matter of the Determination of Heirship of Frances Rogers Potts Roberts a/k/a Fannie Potts Roberts, Deceased, No. PB-2000-92. In an order dated May 24, 2001 (2001 Final Decree), the court found that Fannie had died intestate and determined her heirs to be Lawrence and Laura, her two surviving children; Kerrie Potts Haddock, Arthur Potts, and Dan Roesner, the children of her predeceased son LeRoy; and Appellant, the daughter of her predeceased son Arthur. The court also found that Fannie owned a life estate in a 3.48147 Osage headright, and a fee simple interest in a .44444 Osage headright and funds on deposit at the Osage Agency, BIA. The court declined to probate Fannie's estate, holding that all of her property was covered by her trust.

On August 14, 2001, the Superintendent denied Appellant's challenge to Fannie's trust. Upon advice from the Office of the Solicitor, on August 28, 2001, the Superintendent revised

^{3/} Because remaindermen cannot be finally determined until the death of the life tenant, the Board presumes that the court intended only to identify Fannie's then-probable heirs.

^{4/} The administrative record shows that the trust was notarized twice: Once by notary public Jami Burgess on Aug. 23, 1995, and again by notary public Carrie L. Rogers on Nov. 2, 1999, shortly before Fannie's death. There is no explanation as to why the trust was notarized a second time.

his decision, because the August 14 decision had not discussed funds paid to Agnes by the United States as compensation for the taking of mineral interests underlying certain lakes in Osage County (lake funds).

Appellant appealed the Superintendent's decision to the Regional Director. The Regional Director affirmed the decision on September 5, 2002.

The Board received Appellant's notice of appeal from the Regional Director's decision on October 10, 2002. In her notice of appeal, Appellant argued that the Osage County District Court erred in its 2001 Final Decree by passing Fannie's life estate interests under her trust. She contended that the Regional Director erred in determining that Fannie's other property passed through the trust rather than going to her heirs or under her will.

The Board set a briefing schedule in its November 13, 2002, Notice of Docketing. Appellant did not file an opening brief. On January 27, 2003, the Regional Director filed an answer brief in which she contended: (1) all of Fannie's life estate interests must be distributed to the remaindermen designated in Agnes' will; (2) the lake funds were not an Osage headright nor a mineral interest and should have been distributed in fee to Fannie under the residuary clause in paragraph 12 of Agnes' will; and (3) Fannie's 319.8 acres of restricted lands, .44444 headright interest, IIM account, and lake funds all passed under her trust.

The Board reviewed the record in this case in response to an April 18, 2003, request to withdraw filed by Appellant's attorney. As a result of that review, it ordered supplemental briefing to identify the specific issues on appeal.

In a filing which the Board received on June 25, 2003, the Regional Director stated that, as to the distribution of the lake funds, the January 27, 2003, answer brief did "not comport with counsel's [for the Regional Director] present understanding of the ownership of the lake funds." Regional Director's June 25, 2003, Notice at 2. The filing stated that, according to the 1971 Final Decree in Agnes' estate, the lake funds should have been distributed under paragraphs 7 and 8 of Agnes' will, rather than under the residuary clause in paragraph 12.

In a brief dated July 7, 2003, Appellant agreed with the Regional Director's June 25, 2003, filing. At page 5 of her brief, Appellant stated that there was a "consensus among Appellant and [the Regional Director] as to the proper distribution of [Fannie's] interest."

The Regional Director did not respond to Appellant's brief. The beneficiaries of Fannie's trust have not filed anything in this appeal.

Despite Appellant's belief that she and the Regional Director are now in agreement as to the proper distribution of Fannie's estate, the Board finds that there are issues raised which

must be addressed. To the extent that these issues were not raised by the parties, the Board addresses them under 43 C.F.R. § 4.318, which allows it to exercise the inherent authority of the Secretary of the Interior (Secretary) to correct a manifest injustice or error.

The Board first addresses the Oklahoma State court orders in Fannie's and Agnes' estates. In its 2001 Final Decree in Fannie's estate, the court held that Fannie died intestate and had no property that was subject to probate because all of her property was covered by her trust. Specifically, the court stated:

(4) That the said decedent [Fannie] died seized and possessed of certain property, which is under the jurisdiction of the U.S. Department of the Interior, Bureau of Indian Affairs, Osage Agency, which includes but is not limited to a 3.48147 life estate in an Osage headright interest which was left to [Fannie] by her mother, Agnes * * *, and further a .44444 Osage headright interest which belonged to [Fannie] on the date of her death in fee simple, as well as any funds on deposit at said Osage Agency.

(5) That there exists at this time no lawful ground for an administration upon [Fannie's] estate, and there has never existed any lawful ground therefor as [Fannie] did leave a Revocable Trust Agreement dated November 2, 1999, which left all of [her] property to her two surviving children, Lawrence * * * and Laura * * *.

(6) That upon the death of [Fannie], she left the following heirs, to-wit:

Lawrence R. Potts, Jr., adult son, * * *;
Laura Jane Potts, adult daughter, * * *;
LeRoy S. Potts, pre-deceased adult son, his known surviving heirs are:
 Kerrie Potts Haddock, adult daughter, * * *;
 Arthur Potts, adult son, * * *;
 Dan Roesner, adult alleged son, * * *;
Arthur Potts, predeceased adult son, his known surviving heirs are:
 Cheryl "Cheri" Potts Hall, adult daughter, * * *.

That the foregoing named persons are all of the heirs at law of [Fannie].

2001 Final Decree at 1-2.

In paragraph 4 of the 2001 Final Decree in Fannie's estate, the Oklahoma State court found that, at the time of her death, Fannie held a life estate in a 3.48147 headright interest and

owned a .44444 headright interest in fee simple. From the construction of the court's order, it appears that it also found that Fannie owned the funds on deposit with BIA in fee simple. However, although stating that Fannie's property included, but was not limited to, the two headright interests and the funds on deposit with BIA, the court did not specifically identify any other property interests which Fannie held.

The 2001 Final Decree in Fannie's estate comports with the 1971 Final Decree in Agnes' estate to the extent that it found that Fannie held a life estate in the 3.48147 headright interest. However, under the 1971 Final Decree, Fannie also received a life estate in certain identified real property. According to the administrative record, the real property which Fannie received from Agnes amounted to approximately 695 acres. Even though the 2001 Final Decree in Fannie's estate did not specifically address any real property which Fannie owned at the time of her death, there does not appear to be any dispute here that she owned a life estate in the real property she received from Agnes.

The 2001 Final Decree in Fannie's estate is, however, confusing, because although it recognized that Fannie owned only a life estate in some of her property, it nevertheless stated that "all" of her property was left to Lawrence and Laura under the terms of her trust. In addition, it stated that there were no grounds for probate because of the existence of the trust, but did not mention the fact that any property in which Fannie owned a life estate would pass to the remaindermen by operation of law, outside any trust or will that might exist. See, e.g., Estate of Vivian M. Rogers v. Acting Muskogee Area Director, 14 IBIA 217, 222 (1986). See also In the Matter of the Holographic Will of Rosa Lee Lohah Jake, 29 IBIA 93 (1996) (life estate unaffected by execution of will). Based on a reading of the entire 2001 Final Decree, the Board believes that these omissions were not due to any determination that there was something different about Fannie's life estate or about how the property covered by the life estate passed, but was rather due to inadvertence. Therefore, the Board concludes that any property in which Fannie owned a life estate at the time of her death passed in accordance with the normal rules governing life estates.

Paragraphs 7 and 8 of Agnes' will gave Fannie a life estate in, respectively, Agnes' 3.48147 headright interest and in her real property. The will named the remaindermen to be "the living children of [Fannie], or * * * the lineal descendents of any deceased child of [Fannie], by right of representation." At the time of Agnes' death, Fannie had four living children – Lawrence, Arthur, LeRoy, and Laura – who were identified in the Oklahoma State court's 1971 Final Decree. At the time of Fannie's death, the court found that LeRoy and Arthur had predeceased Fannie, leaving her heirs to be her surviving children, Lawrence and Laura; LeRoy's three children; and Arthur's child (Appellant). In addition to constituting Fannie's heirs, these six individuals were also the remaindermen of her life estates in property received from Agnes. These are the individuals whom the Regional Director identified as the remaindermen to Fannie's life estate. The Board holds that the Regional Director correctly

determined that Fannie's life estate in the 3.48147 headright interest and in approximately 695 acres of real property passed by operation of law to the remaindermen. Therefore, the Board affirms this portion of the Regional Director's September 5, 2002, decision.

The Board next addresses Fannie's trust. Section 6 of the 1978 Act, 25 U.S.C. § 331 note, authorizes Osage Indians to pass certain interests through inter vivos trusts. Section 6 provides in pertinent part:

(a) With the approval of the Secretary of the Interior, any person of Osage Indian blood, eighteen years of age or older, may establish an inter vivos trust covering his headright or mineral interest except as provided in section 8 hereof; [5/] surplus funds; invested surplus funds; segregated trust funds; and allotted or inherited land, naming the Secretary of the Interior as trustee. An Osage Indian having a certificate of competency may designate a banking or trust institution as trustee. Said trust shall be revocable and shall make provision for the payment of funeral expenses, expenses of last illness, debts, and an allowance to members of the family dependent on the settlor.

The Board has held that there is a right to challenge BIA's approval of an Osage Indian inter vivos trust under 25 C.F.R. Part 2 and 43 C.F.R. Part 4, Subpart D; and that this right may be exercised after the settlor's death if the existence and/or terms of the inter vivos trust were kept confidential during the settlor's lifetime. Chouteau v. Acting Muskogee Area Director, 34 IBIA 57, recon. denied, 34 IBIA 112 (1999).

The Superintendent issued his May 31, 2000, notice to Fannie's probable heirs in accordance with the Board's holding in Chouteau. That notice stated at page 1:

The purpose of this memorandum is to advise the parties of their right to contest the execution of a trust executed by [Fannie]. * * * Unless a person who would otherwise inherit an interest in the trust assets by intestacy or by a will challenges the distribution of the trust, the trust assets will be distributed as specified in the trust.

In order to challenge the trust, you must advise us of the following:

* * * * *

3. The specific nature of your challenge to distribution of the trust. You must advise us why you believe the trust invalid. * * *

5/ Nothing in sec. 8 applies in this case.

This notice is confusing in that it speaks of contesting both the execution of the trust and the distribution of the trust. Appellant's July 11, 2000, letter to the Superintendent challenged the distribution, but not the execution, of the trust. Similarly, the Superintendent's decision focused primarily on the distribution of Fannie's assets, rather than on her execution of the trust. The Regional Director specifically found that Appellant had not argued that the trust itself was invalid or that the interests Fannie owned outright should have been distributed in some way other than under the trust.

On appeal, however, Appellant states for the first time that she "is quite sure that [Fannie] was not competent at the time of the creation and funding of the trust." July 7, 2003, Supplemental Brief at 3. While Appellant reserves the right to challenge the execution of the trust, she indicates that she will not dispute the distribution of either the .44444 headright interest or the approximately 319.8 acres of real property committed to the trust.

It appears that, because she determined not to challenge the distribution of the assets covered by the trust, Appellant did not present any arguments that she might have in regard to the execution of the trust. Under the circumstances present here, it would appear that Appellant has attempted to preserve her arguments, rather than to make them. Obviously, Appellant's statement that she "is quite sure" that Fannie was not competent when she executed the trust is not sufficient to carry her burden of proving that Fannie was in fact not competent.

Although the Board has held that it is not required to consider arguments and issues raised for the first time on appeal, it has considered them when to do otherwise would constitute a violation of due process. Because it is not necessary to the disposition of this case, the Board makes no determination here as to whether or not Appellant has successfully preserved her arguments or whether it would consider those arguments should she make them at a later time.

The Regional Director's September 5, 2002, decision held that Fannie owned real property which passed under her trust. This real property, which consisted of approximately 319.8 acres, was not specifically mentioned in the Oklahoma State court's 2001 Final Decree in Fannie's estate. However, the Regional Director found that this real property was held in restricted status at the time of Fannie's death, and therefore concluded that it passed under her trust. Appellant has not objected to this distribution, and the Board sees no reason to disturb the Regional Director's decision. It therefore affirms that part of the Regional Director's September 5, 2002, decision which held that 319.8 acres owned by Fannie at the time of her death passed under her trust.

The Regional Director also held that Fannie's .44444 headright interest and the funds in her Individual Indian Money (IIM) account (not including the lake funds, which are addressed separately below) passed pursuant to the trust. Fannie specifically committed both of

these assets to the trust. However, in its 2001 Final Decree in Fannie's estate, the Oklahoma State court stated that the .44444 headright interest was owned in fee simple and, as discussed above, it appears that the court also stated that the funds on deposit with BIA were fee simple. The Regional Director stated in her January 27, 2003, answer brief that Fannie inherited the .44444 headright interest in fee simple. However, there is nothing in the administrative record showing either how the headright interest passed into fee, or that the trust status of Fannie's IIM funds was removed prior to her death.

The question raised by this is whether an Osage Indian inter vivos trust created under section 6 of the 1978 Act can contain non-trust or non-restricted assets. Section 6 of the 1978 Act describes the types of property that may be committed to such a trust, but does not specify whether the property must be in trust or restricted status. However, the Secretary would not normally have jurisdiction over non-trust or non-restricted assets. If section 6 of the 1978 Act intends to allow the commitment of non-trust or non-restricted assets to a trust administered by the Secretary, then that section is giving the Secretary additional authority over assets owned by Osage Indians. The Board is not aware that the question of whether an Osage Indian inter vivos trust created under the authority of section 6 of the 1978 Act can contain non-trust and/ or non-restricted assets has been addressed.

Because of the existence of this question, the Board vacates that part of the Regional Director's September 5, 2002, decision which held that Fannie's .44444 headright interest and IIM funds passed under her trust. On remand, BIA shall first determine the status of these assets. Based upon its determination of the status of the assets, BIA shall consider the following discussion in regard to the lake funds in determining how to proceed.

Finally, the Board addresses the lake funds. The Regional Director has changed her position in regard to the proper distribution of these funds during the course of this appeal. The Regional Director's original position was that Fannie inherited the lake funds in fee simple and that they passed under her trust. Her present position is that Fannie held a life estate in the lake funds, which, upon her death, passed to the remaindermen by operation of law rather than passing under either her will or her trust.

The Regional Director's present position is set out in her June 25, 2003, filing. The Regional Director stated that the Office of Trust Funds Management, Office of the Special Trustee, Department of the Interior, had provided information in regard to the ownership of Osage lake funds. According to that information, the lake funds at issue here are still held in Agnes' estate with income being paid to Fannie. The Regional Director contends that "[t]his indicates that, because the principal amount is still held in [Agnes'] estate, [Fannie] held only a life estate in the property." June 25, 2003, Notice at 1. The Regional Director continues that "it does not appear that BIA has historically treated [Fannie] as the owner of the lake funds and thus, she would not be able to transfer the lake funds at her death." *Id.* at page 3.

Aside from the obvious procedural problems which arise from the Regional Director's decision to change her position on appeal, 6/ there are several substantive problems with this new position. First and foremost, the position appears to be based on a determination of how BIA treated the funds, not on a determination of how Fannie actually received them. The way in which BIA historically treated the lake funds after Agnes' death is only marginally relevant to the question of how it should have treated them. It appears that the determination of how the lake funds should have been treated turns on the question of whether Fannie acquired the funds under paragraph 7, 8, or 12 of Agnes' will. The 1971 Final Decree is not helpful in answering these questions. The Superintendent's August 28, 2001, decision contains the most rationale for the BIA's determinations here. That decision states at page 4:

The [Oklahoma District] Court, in discussing [Agnes'] will, noted that the cash on deposit in the Osage Agency was only \$4,246.93, or substantially less than the \$13,000 now in the account. Because, however, the \$13,000 in lake funds is principal, we assume that the \$4,246.93 was in an IIM account at [Agnes' death] and that the \$13,000 in lake funds was in a separate account. Thus, the Court was not aware of the existence of the \$13,000 in lake funds. Significantly, the Court did not distribute the funds on deposit at the Agency in a life estate to [Fannie]; rather the Court distributed only the headright itself in a life estate to [Fannie]. * * * The Court then held that all of the residue of the estate passed to [Fannie] in fee. Because neither the lake funds nor any other funds held at the Agency are included in the Seventh paragraph [of Agnes' will] and because everything else in the estate was distributed pursuant to the Twelfth paragraph [of Agnes' will], we believe that the lake funds passed to [Fannie] in fee. As a consequence, the lake funds should be distributed pursuant to the trust.

The Board finds that this discussion is based on assumption and speculation. It furthermore clearly shows that BIA does not know whether the full facts regarding the extent of Agnes' estate were before the Oklahoma State court in 1971.

The problems arising from the fact that the 1971 Final Decree does not appear to address the lake funds are compounded by the fact that the Regional Director's new decision is inconsistent with the 2001 Final Decree in Fannie's estate, which found that all of Fannie's funds on deposit with BIA were held in fee, and that those funds passed under her trust.

6/ The Board has previously informed BIA of several options it has as to how to proceed if it determines that its initial position was incorrect while an appeal is pending. Those options include asking that the decision be vacated and remanded in order to implement the new position and confessing error in the appeal. When BIA merely changes its position, both the parties and the Board are placed at a serious disadvantage.

The Board is troubled by the disagreement between the 2001 Final Decree and BIA's present position. The Board has held that the United States is not bound by an Oklahoma State court decision concerning an Osage headright when it was not formally a party to the litigation. In Bradshaw v. Acting Muskogee Area Director, 18 IBIA 339, 344-45 ((1990), it quoted Drummond v. United States, 324 U.S. 316, 318 (1945):

If the United States in fact employs counsel to represent its interest in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its results * * * But to bind the United States when it is not formally a party, it must have a laboring oar in a controversy.
[Citations omitted.]

However, in both Drummond and Bradshaw, the issue over which the United States and the Oklahoma State court disagreed was not the construction of an Osage Indian's will. Rather, the issue in both cases concerned matters that occurred in regard to a headright interest after the conclusion of probate. Here in contrast, the question over which there is now disagreement is the State court's probate decision.

As previously mentioned, jurisdiction to probate the property of Osage Indians is vested in the Oklahoma District Courts. See sec. 5(b) of the 1978 Act. In essence, this is jurisdiction to construe a will. However, the Secretary has an independent duty to approve or disapprove an Osage will prior to its presentation to the Oklahoma State court for probate. See 25 C.F.R. Part 17. The Secretary therefore has authority to decide whether or not a will is presented to the Oklahoma State court for construction. See Smith v. Muskogee Area Director, 16 IBIA 153, 155 (1988).

There is no evidence in the record before the Board that the Department ever approved Fannie's will. In fact, the Oklahoma State Court's 2001 Final Decree states that Fannie died intestate. If Fannie's will was not, in fact, approved by the Department prior to consideration of her estate by the court, probate was prejudiced. If her will was approved, but not presented to the court, probate was prejudiced even more. The questions now surfacing in this case should have been addressed in any Departmental consideration of Fannie's will. However, any Departmental consideration of those questions now, without involving the Oklahoma State court, would constitute a derogation of the court's statutory authority.

The Board sees no alternative here but to vacate that part of the Regional Director's August 28, 2001, decision which addresses the lake funds and remand that question to her for further consideration. It appears that the determination of how the lake funds pass from Fannie depends upon how Fannie acquired them from Agnes. It thus appears possible that both Agnes and Fannie's estates may need to be reopened in Oklahoma State court.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's September 5, 2002, decision is affirmed as to the 3.48147 headright interest, 695 acres of land, and 319.8 acres of land; vacated and remanded to the Regional Director as to the .44444 headright interest and IIM funds; and vacated and remanded to the Regional Director for further consideration of the disposition of the lake funds including, if necessary, the reopening of Agnes' and/or Fannie's estates in Oklahoma State court. BIA may implement that part of the Regional Director's decision which addressed the 3.48147 headright interest, the 695 acres of land, and the 319.8 acres of land.

// original signed

Kathleen R. Supernaw
Acting Administrative Judge

// original signed

Kathryn A. Lynn
Administrative Judge